

DISCLOSURE OF PROTECTED HEALTH INFORMATION TO BUSINESS ASSOCIATES AND OTHER CONTRACTORS

RESPONSIBILITY: Privacy Official or Designee(s), Designated Attorney or Designee(s)

BACKGROUND:

Behavioral Health and Health Facilities (BBHMF) sometimes contracts with other organizations, or with individuals who are not members of the BBHMF's workforce, to perform services. This may range from claims processing or administration, data analysis, utilization review, quality assurance, billing, benefit management to accounting and legal services. These contractors may require access to protected health information to perform their services for the BBHMF. These contractors are termed business associates. HITECH expands business associates to include entities that provide data transmission services for a covered entity and require access to PHI (e.g. Health Information Organizations, E-Prescribing Gateway, Patient Safety Organizations, etc.) or act as a vendor of a PHR on behalf of a covered entity. By contrast, contractors or business entities that do not require access to PHI to perform their duties under their contracts are not "business associates".

The purpose of this policy and procedure is to establish standards for contracts between the BBHMF and its business associates and other contractors regarding the privacy and confidentiality of PHI. This is to provide assurance that PHI will be safeguarded and that BHMF will have adequate access to PHI maintained by business associates. It also establishes accountability to the BBHMF for how the business associate handles PHI.

POLICY:

1. No member of the BBHMF workforce is permitted to disclose protected health information (PHI) to a contractor unless that contractor requires the information in order for it to perform the services for which BHMF has contracted with it.
2. No member of the BBHMF workforce is permitted to disclose protected health information (PHI) to a business associate (see DEFINITIONS), or to allow a business associate to obtain PHI on behalf of the BBHMF, unless a written contract (or other written arrangement) has been executed between the BBHMF and the business associate. This agreement must include provisions that meet the standards listed in this policy.
3. No business associate of BHMF is permitted to disclose protected health information to another business associate unless written agreement has been executed between the BBHMF and each business associate.
 - 3.1. If the BBHMF is conducting business with an organization found to be a business associate and that business entity releases work to a subcontractor that creates, receives, maintains or transmits PHI on behalf of the business associate, a business associate agreement between the business associate and subcontractor should exist providing all of the protections from the business associate to the BBHMF.
 - 3.2. The BBHMF may be liable for the acts or omissions of its business associate acting within the scope of "agency". Federal common law of Agency will govern whether an agency relationship exists between the BBHMF and the business associate regardless of contract language executed. The BBHMF can be penalized for its agent's violations.

4. If the BBHMF learns that a business associate has materially violated its agreement, the business associate will be notified by the BBHMF. Failure to cure the breach within thirty days will result in termination of the agreement. If, for some reason, the BBHMF determines that it is not feasible to terminate the agreement, the Secretary of the Federal Department of Health and Human Services will be notified.
5. Contractors that do not require PHI in order to fulfill their contractual responsibilities to the BBHMF are not considered business associates; however, since such contractors may encounter PHI incidentally in the process of performing their duties under their contracts, and since the BBHMF has a duty to safeguard PHI, all the BBHMF contracts for services will contain the basic confidentiality clause listed in this policy.
6. A Business Associate Agreement is NOT REQUIRED in the following instances:
 - 6.1. When the BBHMF discloses PHI to a provider of health care services for purposes of providing medical treatment to the individual to whom the PHI pertains.
 - 6.2. To disclose PHI to a health plan for purposes of obtaining payment for health care services; however, health plan contracts with the BBHMF must conform to the standards of the TRADING PARTNER AGREEMENT policy.
 - 6.3. Disclosures of PHI from the BBHMF's group health plan to the BBHMF, in its capacity as plan sponsor, and are governed by the plan documents (See Employee Health Benefit Plan policy).
 - 6.4. When a government agency, with respect to determining eligibility for, or enrollment in, a government health plan that provides public benefits that is administered by another government agency, or collecting PHI for such purposes, to the extent such activities are authorized by law.
 - 6.5. If a business associate is required by law to perform a function or activity on behalf of the BBHMF, or to provide a service described in the definition of business associate (See DEFINITIONS), the BBHMF may disclose protected health information to the business associate to the extent necessary to comply with the legal mandate. The BBHMF will attempt, in good faith, to obtain an agreement that meets the standards of this policy, and, if such attempt fails, will document the attempt and the reasons that the agreement cannot be obtained.
7. Types of Business Associates. At a minimum, persons and organizations that provide the following types of services to or on behalf of the BBHMF are considered business associates:
 - 7.1. Health care clearinghouse (an organization which transmits electronic transactions to, or receives electronic transactions from, other organizations on behalf of the BBHMF).
 - 7.2. Fundraising or marketing.
 - 7.3. Mailing.
 - 7.4. Data analysis or data aggregation of any kind, including services that de-identify PHI.
 - 7.5. Professional services, such as consulting, legal, accounting and auditing, actuarial, management or administration, financial, etc.
 - 7.6. Accreditation.

- 7.7. Electronic data processing, including software and hardware maintenance.
 - 7.8. Photocopying medical records and other sources of PHI.
 - 7.9. Document shredding.
 - 7.10. Re-pricing (such as performed by a preferred provider organization to apply negotiated discounts to claims).
 - 7.11. Storage of PHI (both paper records and electronic media).
 - 7.12. Outsourced services, such as billing or collections, that involve PHI in any way.
 - 7.13. Web site hosting.
 - 7.14. Collection of PHI from patients.
 - 7.15. Person or Vendor of PHR for the BBHMF.
 - 7.16. Health Information Organization (HIO).
 - 7.17. E-Prescribing Gateway.
 - 7.18. Other person or entity that provides data transmission services with respect to PHI to a covered entity and requires routine access to such PHI.
 - 7.19. Subcontractor that creates, receives, maintains or transmits PHI on behalf of a business associate for the BBHMF.
 - 7.20. For purposes of this policy, members of any BBHMF Board of Directors will be considered business associates and will be asked to sign an agreement that contains the provisions required for a business associate agreement; to the extent these provisions are applicable to their role as board members.
8. Standards for Business Associate Contract. All contracts between the BBHMF and Business Associates must contain the following statements or provisions:
- 8.1. A description of the business associate's services performed for, or on behalf of the BBHMF, including a description of the uses and disclosures of the BBHMF PHI permitted to and required of the business associate "as necessary to perform services set forth in Service Agreement."
 - 8.2. The business associate will not use or further disclose the BBHMF PHI other than as permitted or required by the contract, or as required by law, and will not use or disclose PHI in a manner that would violate the requirements of the BBHMF's policies and procedures, and applicable law, if done by the BBHMF. The business associate is directly liable under HIPAA for impermissible uses and disclosures of the PHI it handles on behalf of the BBHMF.
 - 8.3. The business associate will use appropriate safeguards to prevent use or disclosure of the BBHMF's PHI other than as provided for by its contract. The business associate must comply with 164.308 (Administrative Safeguards); 164.310 (Physical Safeguards); 164.312 (Technical Safeguards) and 164.316 (Policies and Procedures and Documentation Requirements) of the HIPAA Security Rule.

- 8.4. The business associate will report to the BBHMF as soon as possible any use or disclosure of the BBHMF PHI not provided for by its contract, of which it becomes aware.
- 8.5. The business associate is required to contact the BBHMF immediately in the event that a breach (see BREACH definition) of data has been discovered for unsecured PHI. The business associate will be responsible for any and all costs associated with notification and mitigation of breach on behalf of the BBHMF.
- 8.6. The business associate agrees to mitigate, to the extent practical, any harmful effect that is known to a business associate of the use or disclosure of PHI in violation of the agreement requirements.
- 8.7. The business associate will require any agent or a subcontractor, to whom the business associate provides the BBHMF PHI, to agree in writing to the same restrictions and conditions that apply to the business associate with respect to such PHI.
- 8.8. The business associate will provide the BBHMF with a copy of any and all the BBHMF PHI in the business associate's possession within 30 days, to comply with individuals' requests to inspect or receive copies of their PHI, or for other reasons as requested by the BBHMF.
- 8.9. The business associate will make available the BBHMF PHI for amendment, and to incorporate any amendments to such PHI when so directed by the BBHMF.
- 8.10. The business associate will record any disclosure of the BBHMF PHI to third parties and will make such records available to the BBHMF within 30 days upon request, as required by the BBHMF to provide an accounting of disclosures in compliance with the ACCOUNTING OF DISCLOSURES OF PROTECTED HEALTH INFORMATION policy, and federal regulations (45 CFR § 164.528). The record must include:
 - 8.10.1. The date of disclosure,
 - 8.10.2. The name, and the address if known, of the entity or person who received the PHI,
 - 8.10.3. A brief description of the PHI disclosed,
 - 8.10.4. A brief statement of the purpose of the disclosure, and
 - 8.10.5. Any relevant documentation, such as a written request from a government or law enforcement agency.
- 8.11. If the BBHMF allows the business associate to disclose information on its behalf, it shall make assurances that the contract language reflects the ability of the business associate to handle an individual's restriction request. The business associate will be required to comply with the restriction only when the covered entity provider, the BBHMF, determines to do so, (except as required by law), and if 1) it is to a health plan for payment or health care operation AND 2) pertains to a healthcare item or service for which the health care provider was paid in full "out-of-pocket".

- 8.12. The business associate will make its internal practices, financial records, and records relating to the use and disclosure of protected health information received from, or created or received by the business associate on behalf of the BBHMF, available to the Secretary or the federal Department of Health and Human Services for the purpose of determining the BBHMF's compliance with federal regulations concerning the privacy of PHI. The business associate will make its internal practices, financial records, and records relating to the use and disclosure of protected health information received from, or created or received by the business associate on behalf of the BBHMF, available for periodic audit of a business associate's compliance to HIPAA regulations.
- 8.13. If feasible, within 30 days of the termination of the contract, the business associate will return or destroy all the BBHMF PHI that it still maintains in any form and retain no copies of such information or, if such return or destruction is not feasible, extend the protections of the contract to the information and limit further uses and disclosures to those purposes that make the return or destruction of the information not practicable.
- 8.14. The BBHMF may terminate the agreement at any time if it determines that the business associate has violated a material term of the agreement, and fails to cure such breach within 30 days of being so notified by the BBHMF. If termination due to failure to timely cure a material breach is practicable for some reason, the BBHMF is required to inform the Secretary of the Department of Health and Human Services of this fact.
- 8.15. A section describing how PHI will be exchanged or transmitted between the business associate and the BBHMF, and delineates the means to be employed by each party for safeguarding the integrity and confidentiality of the data exchanged.
- 8.16. The business associate will, within 30 days of receiving a prior written request, make available during normal business hours at its offices, all records, books, agreements, policies and procedures relating to the use or disclosure of the BBHMF PHI for purposes of enabling the BBHMF to determine the business associate's compliance with the terms of this agreement.
- 8.17. The business associate will immediately discontinue use or disclosure of the BBHMF PHI pertaining to any individual when so requested by the BBHMF. This includes, but is not limited to, cases in which an individual has withdrawn or modified an authorization to use or disclose PHI, or has requested not to receive fundraising solicitations.
- 8.18. The business associate will accept such amendments to the business associate agreement as may subsequently be necessary to comply with changes in federal or state law regarding the security or privacy of PHI, or the business associate may terminate the agreement without prejudice if it is unable to comply with any such amendment.
- 8.19. The business associate is prohibited from directly or indirectly receiving any remuneration in exchange for an individual's PHI unless the individual provides a valid authorization.
9. Contacts between the BBHMF and business associates may contain the following statements or provisions, as may be applicable to the circumstances of the business associate contract.
- 9.1. The business associate is permitted to use protected health information for its own proper management and administration, or to carry out its legal responsibilities.
- 9.2. The business associate may disclose PHI to third parties for the purpose of its own proper management and administration, or as required by law, provided that:

9.2.1. The disclosure is required by law, or

9.2.2. That the business associate has obtained from the third party:

Reasonable assurances that the PHI will be held confidentially and used, or further disclosed only as required by law, or for the purpose for which it was disclosed to the third party by the business associate; and

An agreement to notify the business associate of any instances of which it (the third party) is aware in which the confidentiality of the information has been breached.

9.2.3. The business associate is permitted to use or disclose PHI to perform functions, activities or services for, or on behalf of the BBHMF, as specified in the Services Agreement, provided that such use or disclosure is in accordance with 164.405(e) of the Privacy Rule if done by the BBHMF or meets the minimum necessary policies or procedures of the BBHMF.

9.3. The contract may permit the business associate to provide data aggregation services relating to the BBHMF's health care operations, but only to the extent that the BBHMF expressly authorizes such a use of PHI. Data aggregation means the combining of the BBHMF protected health information with the protected health information of other organizations, to permit data analyses that relate to the health care operations of the respective organizations.

9.4. If the contract calls for the business associate to de-identify the BBHMF PHI, it must contain a requirement to comply with the BBHMF's policies regarding the de-identification of PHI (see DE-IDENTIFIED INFORMATION policy), and to provide the BBHMF with documentation of compliance with such policies. The contract shall also contain a statement that de-identified health information does not constitute PHI as defined in the agreement with the business associate.

9.5. If the contract calls for the business associate to create a limited data set from the BBHMF PHI, it must contain a requirement to comply with the BBHMF's LIMITED DATA SET policy, and to provide the BBHMF with documentation of compliance with this policy. The contract shall also contain a statement that health information in a limited data set constitutes PHI as defined in the agreement with the business associate. (NOTE: If the business associate will also use the limited data set it creates, it must execute a data use agreement with the BBHMF. See the LIMITED DATA SET policy).

9.6. An indemnification clause to protect the BBHMF from damages or fines incurred as a result of violation by the business associate of the provisions of its agreement.

Attached to this policy are business associate contract provisions suggested by the federal Department of Health and Human Services, as published in the Federal Register, 67 FR 53264...53266.

10. Basic Confidentiality Clause. The following clause will be included in all contracts between the BBHMF and any person or organization who is not a business associate, but who may, in the course of performing contractual responsibilities, come into contact with protected health information (examples include cleaning or maintenance contractors):

“Protected health information (PHI) means data or information, including demographic information, whether oral or recorded in any form or medium, that relates to an individual’s health, health care services, or payment for services and which identifies the individual. PHI may include information that relates to the past, present, or future physical or mental health or condition of an individual; the past, present, or future provision of health care to an individual, or the past, present, or future payment for the provision of health care to an individual; and includes information that could be used to identify the individual, such as social security number or driver’s license number, even if the name is not included.

Contractor and the BBHMF agree that it is not necessary for Contractor to have access to any protected health information in order to perform its duties under this contract. However, because of the limited potential of incidental exposure to protected health information, Contractor hereby represents and warrants that its employees, subcontractors, and others performing duties under this contract will be under appropriate supervision and all reasonable measures are in place to limit their exposure to and/or disclosure of any PHI that may be encountered from the BBHMF or its associates. Contractor also agrees to report to the BBHMF any instances of which it becomes aware in which PHI is improperly accessible, stored or disclosed, whether by Contractor’s employees or subcontractors, employees of the BBHMF, or other persons”.

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Victoria L. Jones, Commissioner, Bureau for Behavioral Health and Health Facilities